REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA
Criminal Appeal 317 of 2002

RAMADHAN ALI ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(Being an appeal from Original Conviction and Sentence in Criminal Case No. 132 of

2002 of the Chief Magistrate's Court at Mombasa – L. Achode, PM)

Coram; Before Hon. Justice Mwera & Hon. Justice Maraga

Appellant in person - present

Miss Mwaniki for the State

Court clerk – Kazungu / Mitoto

JUDGEMENT

The appeal herein arose from the conviction and sentence in respect of the charge before the lower court. The appellant was charged under Section 296(2) of the penal code whereby it was alleged that on 22nd December 2001 at about 6.00am at Shika Adabu Location, Mombasa, jointly with others not before court robbed Wambua Joseph of a bicycle and cash Kshs. 2,400/- and immediately before or after such robbery used violence on the said Wambua.

After the trial, conviction and sentence of death, the appellant appealed. He amended the grounds of appeal. They stated that the charge was defective and that identification by a single witness was during very difficult conditions even if it was during broad day light. That the complainant (Wambua PW1) did not describe his attacker(s) at the first instance of reporting to the police and that the identification parade was invalid. And further that the appellant's arrest was not connected to the offence, and his defence was not adequately considered.

The appellant submitted in writing and responded after the reply by the learned state counsel. We then considered the lower court record as a whole, evaluating the evidence on our own, in the light of the grounds of appeal and submissions before us.

On the first ground that the charge was defective, the appellant told us that by omitting the words

"dangerous or offensive" from it, it was rendered incurably defective. The learned state counsel did not agree. On our review of the charge, it contained the date, time and place of the offence. That the appellant and others were involved armed with knives. They fell on Wambua and robbed him of his bicycle and cash, using violence. We found no defect in the charge. Any of the following three ingredients, was enough for a charge under Section 296(2) Penal Code to be laid:

(a) an attack being perpetrated by an offender plus one or more others

(b) the attackers being armed with a dangerous or offensive weapon(s)

(c) using any violence eg by beating, mending or striking the complainant during the robbery.

In our view this ground fails.

Moving to identification (grounds 2 and 4), we reviewed the evidence of the complainant (Wambua) with others on visual identification and also reviewed the evidence on the identification parade. The appellant's position was that by the nature of the attack, Wambua could not identify him and that the identification parade was conducted in a faulty manner. The learned State Counsel had a contrary view. She inclined to the findings of the lower court on this aspect.

Wambua (PW1) was on his way at 6.00am to go and hawk vegetables. Thugs held his bicycle and one who held him stabbed him. Wambua held onto this particular one and they struggled. The man got to the front of PW1, kicked him and at this moment Wambua noticed a gap in the dental structure of his attacker – he had a gap in each of the upper and lower jaws. His mouth sat in a funny shape. PW1 told the learned trial magistrate that he concentrated on these physical features for the sake of identification. Then the man stabbed him more times and PW1 passed out only to come to at Coast General Hospital. He lost the bicycle and Kshs. 2,400/-. After his discharge from hospital PW1 went to a police identification parade and picked out the appellant. PW1 told the learned trial magistrate that the day had broken and so he saw this attacker whom he struggled with well. The assailant had beared his teeth as he removed the knife, all the time kneeling on the witness, which had stuck in its scabbard and so he noticed the gap already described above. That the assailant was the appellant.

This witness was cross-examined at length by the appellant. He maintained that when called to the parade he was able to pick out the appellant whom he had marked well on the day of the robbery. The parade was on 5th January 2002 – some two weeks later, after PW1 left hospital. That PW1 asked to be allowed to look into the mouths of those on parade and that is how he was able to pick out the appellant without hesitation. That in all, there were 8 members of the parade and it was only the appellant who had two gaps in his upper and lower jaws.

The learned trial magistrate remarked that the P3 form evidencing the injuries to PW1 was not produced and neither was the knife used. And that the appellant's mates did not join in the assault. But taking in regard the time of the assault, the circumstances of it all, and we should add that Wambua was very alert and observant before he passed out, we come to the same conclusion as the learned trial magistrate did, that PW1 was able and he did positively identify the appellant at the scene. We also noted that PW1 had in the past seen the appellant in the locality but he took no interest in him. We did not think that the identification here was by recognition, but by identification on account of the appellant's dental formula which PW1 noticed at the time of the attack.

The identification on the parade followed some 2 weeks after the incident. It was conducted by IP Ngumi (PW4) of Inuka Police Post. He had one person in the cells suspected of robbery with violence. The investigating officer (not named) asked PW4 to conduct an identification parade, which the suspect (the present appellant) agreed to participate in. PW1 who was kept in an office was called out. He walked along the line and identified the appellant. The appellant was satisfied with the parade and he signed the form (Exh 3). There were eight (8) members of the parade, besides the appellant. We have gone over the evidence of PW4 and checked Exh. 3 (the parade form). As the learned trial magistrate found, we on our part find no fault with the way the parade was conducted. The complainant had not given the description

of the appellant to PW4 in advance. That would have been wrong. PW4 added that the complainant had a right to look up the parade members and even ask them to open their mouths for any peculiar acts or features he could recall. And that PW4 had no reason to coach the witness to identify the appellant.

This point came out particularly in the light of the argument by the appellant that he alone had a gap in his teeth and that that made him stand out particularly to be picked out by PW1. We do not think so. Members of a parade cannot be 100% look – alike. There are bound to be minor variations. But for this particular case, the gap(s) in the appellant's dental arrangement were recalled by PW1 when he asked the appellant to open his mouth on the parade. He picked him out right there. It was nothing outwardly physical, which the learned trial magistrate would take, or we take that it obviously distinguished the appellant from the other parade members. Thus the parade identification, to us, was proper and valid. The appellant was picked out by PW1 and so the attack on identification at the time of the robbery or on the parade fails. Regarding what led to the arrest of the appellant, on the material morning Clpl Situma (PW3) was at Inuka Police Post when got word that a man had been found injured and lying by the wayside. When PW3 with colleagues went to the scene the injured man who turned out to be Wambua (PW1), could not stand and walk on his own. He was bleeding. They took him to hospital.

Later in the day the same PW3 received information that some suspicious characters had been seen at one drinking place looking for change so that they could divide some money. That that had been at about 7.00am on that day – 22nd December 2001. PW3 went to this place, quite likely, the house of Esther Gauke (PW2) and got information that led him to another drinking den where the appellant and his mates were found and arrested. That the appellant had a fresh injury on his face. When he told PW3 that he sustained it by thugs some days back, he did not believe him because there had been no such report at Inuka Police Post. PW3 who had been to the scene of robbery had noticed that there had been a lot of struggling there. His evidence was that the appellant while in cells, made to instruct some woman to take a key from him and go to his house and remove a dagger. Instead the police got this key and the appellant led them to his house where the dagger (it was marked for identification but not produced) was recovered from under a mattress. The appellants clothes, wet and muddy, were recovered from a corner (a shirt and long trousers cut at the knees (Exh P1 & 2)). Gauke (PW2) from whom the appellant and his friends sought to change money early that morning, knew and identified the shirt as belonging to the appellant. She knew him and his friends before. Although they all went the way that Wambua had been attacked, PW2 also knew Wambua, she did not know whether they are the ones who robbed him. PW3 (Cpl Situma) denied having any basis to frame up the appellant.

The lower court, did not go into the aspect of the appellant's arrest vis avis the offence. But we think the sequence of events is such that the appellant and others attacked Wambua.When PW3 (Cpl Situma) had information of an injured man lying by the way side, he proceeded there to take him to hospital. The two did not seem to have talked about the attacker(s). On the same morning, the appellant whom PW2 (Gauke) knew, went to her to seek change so that the appellant and his colleagues could share some money. PW2 had none; they left. In the meantime PW3 learnt of this visit to Gauke. Although evidence does not bear this out but he proceeded to a drinking den and got information about this change - seeking group. They were traced at another den and they were arrested. Appellant was one of them. From whatever basis PW3 got to overhear the appellant speaking in the cells, they got him to lead PW3 and other officers to his house and wet and muddy clothes were recovered (Exh P1 &2). Gauke recognized the shirt as belonging to the appellant, although it was not said that he wore it on the material day. But as one looks at all these one can still ask: But where is the nexus? The link is this. Wambua was attacked on the morning of 22nd December 2001. Police got information of the attack and the appellant with others were suspected. They were tracked down on the same day and arrested. They were put in the cells. When Wambua recovered, he attended an identification parade which we found to have been properly conducted. Wambua identified the appellant on it and that has been dealt with above. To us all points to the appellant and the commission of the offence herein. We are of the mind that, the course leading to his arrest in any way cannot be associated with the offence. It does, and ground 3 also fails.

For ground 5 about the learned trial magistrate not adequately considering the appellant's defence, we have this to say: He gave an unsworn statement about how on the material morning he went to his work via a "mnazi" place. He bought some, probably, took it and proceeded to his work place. It was a

Muslim Holiday. So the appellant on his way back home was invited by his workmates to more "mnazi" drinking. They could not be given change for Kshs. 100/-. They left for another "mnazi" den where they were arrested at noon and locked up. His mate(s) bribed their way out and he was put on an identification parade. The complainant then picked him out of it – after they were all ordered to open their mouths to him. He was then charged with this offence he knew nothing about.

The learned trial magistrate considered this defence and found it sketchy, far fetched and unreasonable. She rejected it but believed the complainants' case. It was evidence of a single identifying witness. The learned trial magistrate warned herself of the dangers that lurk behind relying and convicting on single witnesses as PW1. We think she correctly addressed herself to that. She convicted the appellant. In our view the lower court weighed the defence against the prosecution evidence and rejected it. On our part that defence should still have been rejected. It was not on the appellant to prove his innocence, but if he was to be believed could it not be helpful eg to call any of his mates he went drinking with until they were arrested at least to tell the learned trial magistrate how it all occurred or that even one of them bribed his way through the police cells? All in all we are unable to agree that the appellant's defence was not adequately considered. It may not have been set out in the learned trial magistrate's judgement but she put it side by side with the prosecution case before she rejected it. We have done just that and come to the same ending. This ground also fails.

In sum this appeal is dismissed in its entirely.

Delivered on 6th September 2005.

J. W. MWERA

JUDGE

D. K. MARAGA

JUDGE